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State Aid Special Report — Part 6: Arm's Length on Appeal

by Ruth Mason

Ruth Mason

Ruth Mason is a professor of law at the University of Virginia School of Law. She thanks Xinh Luu and Cathy Palombi of the University of Virginia law library for their expert research.

In this final installment in a series of reports on state aid, Mason evaluates the European Commission's decisions in the recent state aid cases involving income allocation. She focuses on whether the *sui generis* arm's-length standard that the commission applied in those cases will be upheld on appeal.

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In a recent series of high-profile cases, the commission held that several EU member states granted illegal state aid through tax rulings that conferred selective advantages.[1] Although the commission supported its state aid conclusions on several alternative grounds, the most controversial was the idea that the Treaty on the Functioning of the European Union requires member states to adhere to a state-aid-specific notion of the arm's-length standard for allocating income to multinationals. This report discusses the income allocation cases,[2] shows how the commission derived its *sui generis* arm's-length standard, and evaluates whether the EU courts will uphold it.

The TFEU uses the following language to forbid EU member states from selectively subsidizing businesses:

> Any aid granted by a member state or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade

[1] *See, e.g.*, Commission Decision 2017/502 (Oct. 21, 2015) on state aid implemented by the Netherlands to Starbucks, 2017 O.J. (L 83) 38, para. 254 (*Starbucks* final); Commission Decision 2016/2326 (Oct. 21, 2015) on state aid Luxembourg granted to Fiat, 2016 O.J. (L 351) 1, para. 219 (*Fiat* final); and Commission Decision 2017/1283 (Aug. 30, 2016) on state aid implemented by Ireland to Apple, 2017 O.J. (L 187) 1, para. 224 (*Apple* final). The Belgian excess profits case is a "scheme" case, not individual aid. In a scheme case, the commission argues that an entire regime — here the excess profits ruling regime — constituted state aid. *See* Commission Decision 2015/9837 (Jan. 11, 2016) on the excess profit exemption state aid scheme implemented by Belgium, SA.37667 (*Excess Profits* final).

[2] This report therefore does not cover the McDonald's case, which involved tax treaty interpretation issues. *See* Fadi Shaheen, "Tax Treaty Aspects of the McDonald's State Aid Investigation," *Tax Notes Int'l*, Apr. 24, 2017, p. 331.

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between member states, be incompatible with the internal market.[3]

To anyone reading this far in my reports, the elements of illegal state aid are familiar.[4] There must be (1) an advantage (2) granted by a member state (3) to an undertaking. The advantage must be granted (4) selectively, and it must (5) distort trade or competition in the internal market.[5] A tax advantage otherwise satisfying the above elements still can be justified by the nature or general scheme of the tax system.[6] Because the other elements are easily satisfied, tax cases turn on whether there was a selective advantage. EU law explicitly recognizes that the state aid concept evolves with the internal market.[7]

This is my sixth and final installment in a multi-part report on tax rulings as state aid. This installment focuses on whether the *sui generis* arm's-length standard that the commission applied to show selective advantage in the recent income allocation cases will be upheld on appeal.

I. The Troubled Reference Base Approach

There are two kinds of state aid: general and individual. Cases involving individual aid — in which only a particular undertaking receives aid — presumptively satisfy the selectivity requirement.[8] The commission argued that the recent cases involved individual aid,[9] but to cover its bases, the commission also argued that the cases involved non-individual or general aid. The commission must establish selectivity in general aid cases.

The selectivity doctrine is developing rapidly in the tax area. A measure is selective when it "confers the benefit . . . exclusively on certain undertakings or certain sectors of activity."[10] There is considerable controversy over what that means, but a few things are clear: Selectivity is gauged by the practical effect of the contested measure,[11] and a measure that is available on the same terms to every similarly situated undertaking is not selective.[12]

In nontax cases, the commission determines whether a member state conferred state aid by asking whether the state held the enterprise at arm's length. States confer illegal aid when, to benefit specific enterprises, they take actions that independent investors would not have taken. Thus, a member state loan to, or investment in, a company constitutes illegal aid if independent investors would not have made the same loan or investment on the same terms.[13]

This counterfactual approach simply does not work in tax cases. Because only states impose taxes, there are no comparables that the commission can use to establish whether the state acted as a private market economy operator would have.[14] To resolve this dilemma, the commission normally determines selectivity by following a three-step procedure. It (1) identifies a reference baseline consisting of generally applicable domestic tax law, then (2) shows that the state deviated from the baseline in a way that benefitted some enterprises while failing to benefit (3) other enterprises in a comparable

[3] *See* Consolidated Version of the Treaty on the Functioning of the European Union, art. 107(1), 2010 O.J. (C 83) 47, art. 107(1) (Mar. 30, 2010).

[4] Ruth Mason, "Tax Rulings as State Aid FAQ," *Tax Notes*, Jan. 23, 2017, p. 451; Mason, "State Aid Special Report — Part 2: Legitimate Expectations," *Tax Notes*, Jan. 30, 2017, p. 615; Mason, "Special Report on State Aid — Part 3: Apple," *Tax Notes*, Feb. 6, 2017, p. 735; Mason, "Tax Rulings as State Aid — Part 4: Whose Arm's-Length Standard?" *Tax Notes*, May 15, 2017, p. 947; and Mason, "An American View of State Aid," *Tax Notes*, Oct. 30, 2017, p. 645.

[5] Joined Cases C 164/15 P and C 165/15 P, *Aer Lingus*, EU:C:2016:990, para. 28.

[6] Joined Cases C-106/09 P and C-107/09 P, *Gibraltar*, EU:C:2011:732, para. 36. The aid must be proportional to the justification.

[7] *See* Council Reg. 2015/1589 (July 13, 2015), laying down detailed rules for the application of TFEU art. 108 (codification) (2015 regulation); and TFEU art. 1(b)(v) (characterization of a measure as existing aid can change "due to the evolution of the internal market").

[8] Case C-15/14 P, *Commission v. MOL*, EU:C:2015:362, para. 60 ("The identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective.").

[9] *Starbucks* final, *supra* note 1, at para. 254; *Fiat* final, *supra* note 1, at para. 218; and *Apple* final, *supra* note 1, at para. 244. *Excess Profits* final involved a state aid "scheme," not individual aid.

[10] Joined Cases C 20/15 P and C 21/15 P, *World Duty Free Group*, EU:C:2016:981, para. 55 (citing Case C270/15 P, *Belgium v. Commission*, EU:C:2016:489, paras. 49 and 50).

[11] *See, e.g.*, Joined Cases C-106/09 P and C-107/09 P, *Gibraltar*.

[12] Commission notice on the notion of state aid as referred to in TFEU art. 107(1), O.J. C 262/1, at para. 119 (July 19, 2016) (2016 notice). *But see Gibraltar*.

[13] *See, e.g.*, 2016 notice, *supra* note 12, at para. 98 ("To establish whether a transaction is in compliance with market conditions, that transaction can be assessed in the light of the terms under which comparable transactions carried out by comparable private operators have taken place in comparable situations."). The commission also uses other techniques outside the tax context that cannot be replicated for tax. *See, e.g.*, *id.*, para. 102 (calculation of the internal rate of return on the member state's investment in the enterprise).

[14] *See* 2016 notice, *supra* note 12, at paras. 73-85.

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factual and legal situation.[15] The idea of a reference base does not appear in the state aid articles of the TFEU[16] nor in EU state aid regulations, but the commission outlined it in published guidance, and the Court of Justice of the European Union accepts the approach.[17]

According to the commission, the reference system is "a consistent set of [tax] rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective."[18] The commission clarifies that the reference system "is based on such elements as the tax base, the taxable persons, the taxable event, and the tax rates."[19] As examples of reference bases, the commission cites the corporate tax, the VAT, and "the general system of taxation of insurance."[20]

The choice of a reference base is probably the most controversial doctrinal aspect of the recent cases, and member states appealing the recovery orders have challenged the commission's reference base judgments.[21]

To get a sense of the difficulty of establishing a tax reference base, consider whether a territorial tax regime constitutes state aid. Under a territorial tax regime, a state taxes resident companies on domestic income but exempts their foreign-source income. Under such a system, do companies with foreign-source income receive a selective advantage? To answer, we need a reference baseline. Three come immediately to mind.[22]

First, the baseline could be taxation of all of a company's income, regardless of source. If worldwide tax is the baseline, territoriality would confer selective advantages to taxpayers with foreign-source income but not to companies without foreign-source income. The state might try to justify the exemption of foreign-source income by citing the need to avoid double taxation, but the commission might say credits are sufficient to achieve that goal.

Alternatively, if the commission regards territoriality, along with its exemption for foreign-source income, as the reference base, there would be no advantage, no aid, and no need for justification.[23]

A third possible baseline might be single taxation of all of a resident's worldwide income at the home country's tax rate. In that case, exemption would confer advantages only when the source tax rate was lower than the residence rate.

Different baselines generate different conclusions on whether an advantage exists or whether that advantage is selective. The commission and EU courts provide little guidance on how to construct the reference base, and cases follow no clear pattern.[24] Advocate General Niilo Jääskinen recently noted commentators' complaints that "neither the European Commission nor the Court of Justice has succeeded in determining precisely what is covered by the term 'derogation from the norm' or what constitutes the 'norm' or 'a general system.'"[25]

In her opinion in *Linz*, Advocate General Juliane Kokott likewise highlighted the problem of multiple potential baselines. She reported that the Austrian court that referred *Linz* to the CJEU offered three different potential baselines for evaluating an Austrian goodwill amortization rule for groups: the entire body of Austrian law on

[15] *Id.* at para. 128.

[16] *See* TFEU arts. 107-109.

[17] 2016 notice, *supra* note 12, at para. 128.

[18] *Id.* at para. 133.

[19] *Id.* at para. 134.

[20] *Id.*

[21] *See infra* discussion Section II.

[22] Werner Haslehner provided an example in which the question was whether a double-tax relief provision constituted state aid. He proposed five different plausible reference bases and five plausible groups against which the taxpayer receiving the relief could be compared. Haslehner, "Double Taxation Relief, Transfer Pricing Adjustments, and State Aid Law," in *State Aid Law and Business Taxation* 117-119, 139-141 (2016).

[23] That the commission selected territorial taxation as the reference base in a recent case strongly suggests that the commission regards territorial taxation as an acceptable part of a reference base (*i.e.*, territoriality is not aid per se). State Aid SA.34914 (2013/C) — (ex 2013/NN) — United Kingdom Gibraltar Corporate Tax Regime, C(2013) 6654 final, para. 32 (Oct. 16, 2013). *But see id.* at para. 40 (noting that Gibraltar's territorial tax regime was justified to prevent double tax because Gibraltar had no tax treaties).

[24] My last report traced the interpretation of selectivity in the business tax context up to the current cases. Mason, "An American View of State Aid," *supra* note 4.

[25] Joined Cases C-106/09 P and C-107/09 P, *Gibraltar* (opinion of Jääskinen) EU:C:2011:215, para. 184.

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the taxation of profits, just corporate tax law, or the law concerning group taxation.[26] Kokott went on to make the point that the choice of the reference base therefore could not be a decisive element of the state aid analysis. I conclude the opposite — that selection of the reference base usually determines the outcome of the state aid inquiry.[27]

The recent cases pose the following question: What is the reference base in a case involving the allocation of income from the cross-border activities of multinationals? In some of those cases, the commission uses as the reference base the state's own rules for allocating international income.[28] Other times it uses the state's rules for taxing domestic income of stand-alone companies,[29] and still other times it uses the state's rules for stand-alone companies combined with the commission's normative view on how states *ought* to allocate international income.[30]

Likewise, establishing the reference base (and thereby measuring recovery) in rate cases is, as far as I can tell, arbitrary.[31]

Along with advocates general, other experts have acknowledged the difficulty of distinguishing the reference base from deviations from the reference base,[32] and states' use of regulatory taxes exacerbates the problem. The reference base problem is familiar in tax expenditure analysis, in which there is no ready solution. In tax expenditure analysis, we usually rely on the notion that although we lack perfect agreement about what constitutes the baseline and what the deviations are, there is enough agreement that the concept retains analytical force.[33]

But the stakes are higher in state aid analysis because the reference base also serves as the method for calculating the dollar amount of the recovery. Under EU rules, the commission orders the member state to collect (with interest) the additional tax the state would have collected had it applied the proper reference base to the taxpayer.[34] Thus, it is not enough to know that a tax provision conferred an advantage; courts must be able to measure the advantage against a baseline in order to calculate the recovery.[35]

The uneasy consensus we have reached in the United States on the estimation of tax expenditures is absent from state aid analysis, in which among the provisions the commission has held to be selective are payroll and property taxes capped at a percentage of profits (because they

[26] Case C-66/14, *Finanzamt Linz v. Bundesfinanzgericht* (opinion of Kokott), EU:C:2015:242, para. 88. The CJEU ultimately disposed of *Linz* on other grounds, so it was not forced to choose among the proffered reference bases.

[27] I made the analogous point in the fundamental freedoms context. *See* Mason, "Made in America for European Tax: The Internal Consistency Test," 49 *B.C. L. Rev.* 1277 (2008).

[28] Joined Cases C-182/03 and C-217/03, *Forum 187 ASBL*, EU:C:2006:416.

[29] *See infra* discussion Section IV.B. *See also* Richard Lyal, "Transfer Pricing Rules and State Aid," 38 *Ford. Int'l L. J.* 1017, 1040 (2015) (arguing that in transfer pricing cases, "the identification of the reference system seems straightforward. It is quite simply the taxation of independent companies. They are taxed on their revenue less costs, both sides of the equation being fixed by the market. For related companies the answer is no different: they are taxed on revenue less costs, [and the] surrogate for market prices is an arm's-length price which must be arrived at by a uniform and defendable method.").

[30] *See infra* discussion Sections II through IV.

[31] In recent notified aid cases, the commission threw up its hands, declaring that it had no way to determine the reference base in a progressive tax rate case. *See, e.g.*, Commission Decision 2016/1848 (July 4, 2016), on the measure implemented by Hungary on the 2014 amendment to the Hungarian food chain inspection fee, 2016 O.J. (l 282) 63. Eschewing a reference base is practical in notified aid cases in which the commission either red-lights or green-lights the proposed tax regime. But in *Aer Lingus*, a recent case involving unnotified aid, when the commission needed a reference base to calculate the recovery from the taxpayers, the commission picked the highest tax rate as the reference base, which maximized the violation and therefore the recovery. The CJEU confirmed that approach on appeal. *See* Joined Cases C 164/15 P and C 165/15 P, *Aer Lingus*, EU:C:2016:990 (discussed *infra* Section IV.D.2). In the United States, we have the same problem with whether progressive taxes should be characterized as tax expenditures.

[32] *See* Lyal, *supra* note 29, at 1030-1031 (noting that all regulatory taxes could be examined as state aid but warning that such an approach "could lead to extensive intervention of State aid control in the economic policy of member states" and that "it is not clear just to what extent the scope and purpose of the State aid provisions of the Treaty justify such intervention"). *See also* Axel Cordewener, "Asymmetrical Tax Burdens and EU State Aid Control," 2012/6 *EC Tax Rev*. 288 (considering baseline issues).

[33] The federal budget describes in detail the (sometimes arbitrary) baseline choices made in estimating tax expenditures. *See, e.g.*, Office of Management and Budget, "Fiscal Year 2015, Analytical Perspectives," at 127-165 (2014).

[34] Joined Cases C 164/15 P and C 165/15 P, *Aer Lingus*, EU:C:2016:990, para. 100 ("Recovery of aid entails the restitution of the advantage procured by the aid for the beneficiary, not the restitution of the economic benefit that may have been conferred by the aid as a result of the exploitation of the advantage. There is therefore no need to examine whether and to what extent those [beneficiaries] actually utilised the economic advantage" by, for example, lowering prices.).

[35] The EU conceives of recovery as disgorgement rather than as a penalty.

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favor more profitable companies over less unprofitable companies),[36] taxes on property (which favor companies with less property over companies with more property), and taxes on payroll (which favor companies with fewer employees over companies with more employees), at least when the payroll and property taxes were not coupled with a general corporate net income tax.[37] And all those selectivity findings were in a single case: *Gibraltar*.[38] I will discuss *Gibraltar* later.[39]

The reference base issue is central to determining the relative power of the commission and the member states. Fewer constraints on the commission's choice of reference base mean greater state aid enforcement powers in the commission and reduced tax powers in the states. Choices about the reference base should be made in light of the goals underlying the state aid prohibition. Unfortunately, with the exception of *World Duty Free*, discussed in my most recent report,[40] the commission and EU courts often miss opportunities to connect analysis in tax cases to the normative justifications for the state aid prohibition. Articulated values include promoting a level playing field for market competitors, ensuring market integration, ensuring single taxation, combatting tax evasion and avoidance, and enforcing the so-called benefits principle by allocating income to the source jurisdiction.[41] Those values may conflict with each other, and they have differing implications for the scope of the state aid prohibition. Lack of clear normative goalposts means that state aid decisions are often characterized by a disagreement between the commission and the member state over what constitutes the reference base, leaving commission decisions vulnerable to criticism that they are ad hoc and outcome-driven.

My most recent report suggested that the commission could improve legal certainty by abandoning the reference base approach in favor of a nondiscrimination approach like the one the CJEU uses to analyze cases under the fundamental freedoms.[42] But the commission appears committed to the reference base approach in all but exceptional cases, and it used the reference base approach in the recent income allocation cases discussed here.

II. The Income Allocation Cases

This section focuses on the commission's selectivity analysis in its final rulings in the recent income allocation cases. It is primarily descriptive; those familiar with the cases should skip to Section III.

A. *Starbucks* Final

In *Starbucks* final, decided in October 2015, the commission concluded that the Netherlands granted rulings that attributed too little of Starbucks's profit to the Netherlands. The Netherlands had incorporated into domestic law the arm's-length standard and the 1995 OECD transfer pricing guidelines.[43] Most of the commission's decision focused on showing that because Starbucks did not apply the arm's-length standard properly in its ruling request, the Dutch Ministry of Finance should not have granted the ruling.

As a result of these flawed rulings, Dutch Starbucks, which among other functions roasted and packaged Starbucks beans, paid what the

[36] Commission Decision 2005/261 (Mar. 30, 2004), on Gibraltar corporation tax reform, 2005 O.J. (L 85) (*Gibraltar* final), at para. 133 ("The exemption of unprofitable companies from payroll tax and business property occupation tax through the operation of the 15 percent cap is selective.").

[37] *Id.* at para. 143 (holding payroll and property taxes selective, at least when they are not accompanied by a net corporate income tax — that is, "a general system of taxation of company profits"). The commission held payroll and property taxes to be selective because Gibraltar had many offshore companies that would tend to be exempt. Thus, the advantageous exemption was "not effectively open to all firms on an equal basis." *Id.*

[38] *See* Joined Cases C-106/09 P and C-107/09 P, *Gibraltar*, EU:C:2011:732 (rejecting the commission's analysis on profits but accepting it on property and payroll taxes).

[39] *See infra* Section IV.D.1.

[40] Mason, "An American View," *supra* note 4, at 651-652 (describing how in *World Duty Free* the commission and the CJEU connected selectivity analysis to the state aid goal of preventing favoritism of cross-border over domestic investment).

[41] *See* Mason, "Part 4," *supra* note 4.

[42] As part of a nondiscrimination approach, the commission could use a tiers of scrutiny model like the one the U.S. federal courts use in equal protection clause analysis. Under that approach, the commission would compare the treatment of the suspect class with treatment of the non-suspect class. My review of the case law reveals that the CJEU would consider the following to be suspect classifications: sector, region, size, type, and engagement in cross-border economic activity. Mason, "An American View," *supra* note 4.

[43] *Starbucks* final, *supra* note 1, at para. 87.

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commission regarded as too much to a Swiss affiliate for raw beans, and it paid royalties that the commission regarded as too high to a British affiliate for various licenses, trademarks, and recipes. Those payments reduced the company's taxable income in the Netherlands, resulting in too little tax there.

The commission followed the traditional three-step process for establishing a selective advantage: (1) identify the reference base, (2) identify the deviation, and (3) show that the deviation benefits some companies but not comparable others. The last element essentially requires the commission to show discrimination.[44]

In determining the proper reference base for calculating the income of multinationals, the commission looked to the Netherlands's tax treatment of stand-alone domestic companies. According to the commission, taxable income for Dutch stand-alone companies "coincides with accounting profit (subject to certain adjustments)."[45] Along with Dutch tax rules for stand-alone Dutch companies, the commission said that the reference base also consisted of the tax rules for "group companies, which resort to transfer prices to allocate profits."[46]

The commission specifically rejected the notion that the reference base included Dutch domestic law that set forth the arm's-length method and the decree under Dutch law that incorporated the 1995 OECD transfer pricing guidelines.[47] The commission also was unwilling to compare the Dutch treatment of Starbucks only with Dutch treatment of other multinationals.[48] Instead, the commission reasoned that the purpose of the Dutch arm's-length method and the OECD guidelines was "to align the tax treatment of related companies with the tax treatment of unrelated companies."[49] Thus, the reference base had to include stand-alone domestic companies. For good measure, the commission added that if the Netherlands had special rules for group companies that did not apply to domestic companies (presumably including special allocation rules), that itself might be selective.[50]

The commission went on to conclude that the Netherlands conferred a selective advantage because the ruling the Netherlands approved for Starbucks deviated from the arm's-length standard.[51] But instead of using the Netherlands's own conception of arm's length (with its contemporaneous decree pointing to then-applicable 1995 OECD transfer pricing guidelines), the commission asserted that the state aid rules impose a state-aid-specific arm's-length income allocation requirement on the member states:

> The arm's length principle therefore necessarily forms part of the Commission's assessment under Article 107(1) of the Treaty of tax measures granted to group companies independently of whether a member state has incorporated this principle into its national legal system.[52]

The commission used that standard, rather than Dutch law incorporating the 1995 OECD transfer pricing guidelines, to prove a deviating advantage. To give content to its own arm's-length standard, the commission relied heavily on both the 1995 and the 2010 OECD transfer pricing guidelines, the latter of which postdated the *Starbucks* final ruling.[53] The commission concluded that the Dutch ruling for Starbucks deviated from this OECD-inflected, but ostensibly independent, arm's-length standard.[54]

[44] *See generally* Mason, "An American View," *supra* note 4. *See also* Cordewener, *supra* note 32.

[45] *Starbucks* final, *supra* note 1, at para. 244.

[46] *Id.*

[47] *Id.* at para. 246.

[48] *Id.* at para. 249.

[49] *Id.*

[50] *Id.* at para. 250.

[51] Among the problems that the commission identified in the Dutch rulings for Starbucks were that the price for green beans lacked transfer pricing documentation, that comparable uncontrolled prices were available that Starbucks and the Ministry of Finance did not use, and that the Dutch entity was incorrectly identified at the less complex (tested) party in the transactional net margin method (TNMM) analysis and therefore erroneously allocated only a routine profit. *See Starbucks* final, *supra* note 1, at paras. 360-361, 377, 399, and 407.

[52] *Id.* at para. 264.

[53] *Id.* at paras. 255-408 (repeatedly using the 2010 guidelines). The Netherlands granted the contested ruling in 2008. *Id.* at para. 40.

[54] *Id.* at para. 265.

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As an alternative line of reasoning, the commission also concluded that the Netherlands failed to follow its own transfer pricing rules.[55]

As the last step in establishing selectivity, the commission must show that the member state discriminated in granting the advantage — that some undertakings received the benefit while comparable others did not.

The commission compared groups and stand-alone companies and found that they were in a "similar factual and legal situation."[56] Whereas determining the income of stand-alone companies was "straightforward,"[57] income of groups required the "use of proxies,"[58] but the commission concluded that the Dutch tax system's goal for both was the same — namely, to "tax profits of all companies subject to tax in the Netherlands."[59] Because the tax goal for stand-alone companies and groups was the same, stand-alone companies and groups were comparable, and they had to be treated the same.

According to the commission, treating groups and stand-alone companies the same demanded application of the commission's own state aid arm's-length principle to group companies. This was because, in the commission's view, that principle approximates a market-based outcome, which the commission regarded as the relevant standard for whether a state conferred an advantage in calculating a group member's income.[60] Deviations from the commission's state aid arm's-length standard were discriminatory and therefore selective.

Although the commission claimed that the state aid rules entitled it to evaluate the *Starbucks* final ruling according to its own, independent arm's-length standard, in actually conducting its analysis of whether the Netherlands violated that standard, the commission relied heavily on contemporaneous and modern OECD guidance on the arm's-length method.[61] Experts can differ about whether the commission applied the OECD guidance correctly.

Among other arguments on appeal, the Netherlands argues that the commission used the wrong reference base and erroneously judged the Starbucks ruling by whether it deviated from an EU arm's-length standard, which the Netherlands argues does not exist. It also argues that the commission erroneously rejected the Netherlands's application of the transactional net margin method (TNMM) in favor of the commission's own application of that method even though, according to the Netherlands, the commission never showed that its own method was superior to the one the Netherlands had used.[62] Starbucks makes similar arguments.[63]

B. *Fiat Chrysler* Final

Fiat final involved a ruling granted by Luxembourg.[64] Fiat had a financing subsidiary in Luxembourg called FFT, which had branches in the United Kingdom and Spain. Luxembourg approved a ruling for FFT that, in the commission's view, "seemed to agree to a fixed base of tax . . . that . . . remain[ed] stable even if FFT, for example, significantly increased its activities."[65] In the commission's view, the ruling allowed FFT to report too little income to Luxembourg.

As with *Starbucks* final, the commission decided that the reference base was "the general Luxembourg corporate tax system," "which has as its objective the taxation of profits of all companies subject to tax in Luxembourg."[66] The Luxembourg tax base, as the commission saw it, defined taxable income as "profits realized minus tax-deductible expenses and losses."[67] For stand-

[55] *Id*. at paras. 409-412 (citing the OECD guidelines that the Netherlands had transposed to domestic law).

[56] *Id*. at para. 236.

[57] *Id*. at para. 235.

[58] *Id*.

[59] *Id*. at para. 236.

[60] *Id*. at para. 334.

[61] *Id*. at paras. 255-408.

[62] Case T-760/15, Action for Annulment (Dec. 23, 2015), *Netherlands v. Commission*, 2016 O.J. (C 59) 50.

[63] Case T-636/16, Action for Annulment (Sept. 5, 2016), *Starbucks and Starbucks Mfg. Emea v. Commission*, 2016 O.J. (C 462) 25.

[64] *Fiat* final, *supra* note 1. The commission formally began its investigation of FFT in June 2014. At that time, the commission suspected, but Luxembourg had not yet confirmed, that FTT was part of the Fiat group. *Id.* at para. 13-6. Fiat and Chrysler merged in August 2014.

[65] *Id*. at para. 131.

[66] *Id*. at paras. 193-194.

[67] *Id*. at para. 194.

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alone companies, that calculation was "straightforward," but for group companies it required the "use of proxies."[68]

Even though it acknowledged that income could not be calculated in the same way for stand-alone companies and multinationals, the commission concluded, as it had in *Starbucks* final, that this fact had "no relevance for determining the reference system," and further, that "both types of companies should be considered to be in a similar factual and legal situation."[69] The commission in *Fiat* final thereby handled the reference base question and the comparability question together. As with *Starbucks* final, the tax base for stand-alone companies in Luxembourg was "accounting profit (subject to certain adjustments based on tax law)," while for group companies Luxembourg resorted "to transfer prices to allocate profits."[70]

As in *Starbucks* final, in *Fiat* final the commission rejected the notion that the reference base should consist only of Belgium's treatment of other multinational groups; it also rejected Fiat's argument that the reference base should consist only of group financing companies.[71]

Luxembourg law incorporated the arm's-length method and the OECD transfer pricing guidelines,[72] but Luxembourg argued that the reference base should also include "national law and practice,"[73] including administrative explanations for how to determine arm's-length remuneration for intragroup financing.[74] In contrast, citing *Forum 187*, the commission concluded:

> The arm's length principle . . . necessarily forms part of the European Commission's assessment under Article 107(1) of the TFEU of tax measures granted to group companies, *independently* of whether a member state has incorporated this principle into its national legal system. It is used to establish . . . that that company is not treated favourably under the general corporate income tax system as compared to non-integrated companies whose taxable profit is determined by the market.[75]

Thus, as in *Starbucks* final, in *Fiat* final the commission claimed authority to evaluate Luxembourg's rulings against its own independent arm's-length standard rather than Luxembourg's allocation rules and administrative guidance.

In answer to Luxembourg's objection that the commission "replaces the national tax authorities in the interpretation of Luxembourg law," the commission responded that it had not measured the derogation as compared to Luxembourg law, but rather as compared to the independent arm's-length principle that applies in all state aid cases.[76] As with *Starbucks* final, after asserting its prerogative to apply its own arm's-length standard, the commission actually seemed to judge Luxembourg's *Fiat* final ruling by OECD standards.[77]

Again, as an alternative line of reasoning, the commission also concluded that Luxembourg violated its own domestic arm's-length standard in the Fiat ruling.[78]

On appeal, Luxembourg argues that the commission failed to prove any of: advantage, selectivity, or a restriction of competition.[79] For its

[68] *Id*. at para. 197.

[69] *Id*. at paras. 198-199.

[70] *Id*. at para. 209.

[71] *Id*. at para. 210. The commission compelled Luxembourg to submit all its other rulings for financing companies, which amounted to 21 rulings. Fiat argued that establishing a derogation required the commission to show that Luxembourg treated Fiat better than it treated the other 20 finance companies. *Id*. at para. 210.

[72] *Id*. at para. 77.

[73] *Id*. at para. 148.

[74] *Id*. at para. 79.

[75] *Id*. at para. 228 (emphasis added).

[76] The commission explained that it was not examining whether the contested ruling complied with the arm's-length principle as laid down in Luxembourg's domestic arm's-length legislation or Luxembourg guidance on arm's length for intragroup financing, "but whether the Luxembourg tax administration conferred a selective advantage on FFT for the purposes of Article 107(1) of the TFEU by issuing a tax ruling that endorses a profit allocation that departs from the amount of profit . . . if the same transactions had been executed by independent companies negotiating under comparable circumstances at arm's length." *Id.* at para. 229.

[77] *Id*. at paras. 219-311 (applying the 2010 transfer pricing guidelines).

[78] *Id*. at paras. 315-317. As a second alternative line of reasoning, the commission concluded that Luxembourg lacked a consistent method for allocating this type of income, which itself conferred selective advantages through inconsistent application. *Id*. at paras. 325 and 336.

[79] Case T-755/15, Action for Annulment (Dec. 30, 2015), *Luxembourg v. Commission*, 2016 O.J. (C 59) 48.

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own part, Fiat Chrysler argues that "the European Commission's novel formulation of the arm's length principle introduces complete uncertainty and confusion as to when an advance pricing agreement, and indeed any transfer pricing analysis, might breach EU state aid rules."[80]

C. *Belgian Excess Profits* Final

Belgian Excess Profits final involved Belgium's regime that exempted so-called excess profits, defined as those deriving from economies of scale, synergies, and the like.[81] Belgium limited the exclusion of excess profits in several ways: Exclusion required an administrative ruling from Belgium; only multinational (not domestic) groups could apply for excess profits rulings; and the commission argued (although Belgium disputed) that Belgium conditioned rulings on the requirement that the requesting taxpayer increase its activities in Belgium.[82] The commission ultimately concluded that the ruling regime conferred state aid.

According to the commission's description:

> Excess profit is determined by estimating the hypothetical average profit that a stand-alone company carrying out comparable activities could be expected to make in comparable circumstances and subtracting that amount from the profit actually recorded by the Belgian group entity in question.[83]

Belgium identified excess profits through a multi-step process that required the taxpayer to get a ruling.[84] In step one, Belgium assumed the Belgian company seeking the ruling was the "central entrepreneur," the untested party under the TNMM. As a result, under the TNNM, non-Belgian affiliates would be assigned only a (small) normal return. That left the (large) residual with the Belgian central entrepreneur.

Then, in the second step, Belgium reversed the assumption in the first step. Now Belgium assumed the Belgian company was the tested party that performed only routine functions and therefore should earn only a routine return. That meant that the residual was allocated abroad to the foreign affiliates.

The third step essentially excluded from tax the difference in the results between the first two steps.[85] In this way, Belgium claimed that it identified, quantified, and excluded excess profits, which were exempt as a matter of tax policy.

The exclusion required a downward adjustment by Belgium. That adjustment was not conditioned on a corresponding upward adjustment by any other state,[86] and Belgium did not inform any other state of its own downward adjustment. The Belgian Finance Ministry explained that it did not inform any other country of the downward adjustment because "it is not for Belgium to specify to which country excess profit ought to be attributed and . . . it is therefore not possible to determine with which country the information on a Belgian downward adjustment should be exchanged."[87] Belgium claimed that "the rationale for the Excess Profit exemption is to ensure that a Belgian group entity is only taxed on its arm's length profit by exempting . . . profit [that] corresponds to synergies, economies of scale or other benefits drawn from its participation in a multinational group and which would not exist for a comparable stand-alone company."[88]

The first step in determining whether Belgium granted state aid was for the commission to identify the reference base. Although Belgium argued that the excess profits regime should be

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[80] Case T-759/15, Action for Annulment (Dec. 29, 2015), *Fiat Chrysler Finance Europe v. Commission*, 2016 O.J. (C59) 49.

[81] *Excess Profits* final, *supra* note 1, at para. 13.

[82] *Id*. at paras. 20-21 (noting that rulings were available only for "new situations," which the commission characterized as "conditioned upon relocation or increase of activities in Belgium and . . . proportional to the importance of the new activities and profit created in Belgium").

[83] *Id*. at para. 13.

[84] *Id*. at para. 15.

[85] This is a simplified explanation. Details are available in the commission's decision. *Excess Profits* final, *supra* note 1, at para. 18.

[86] *Id*. at para. 117. *See id*. at para. 174 (the commission identified this feature as "an important element distinguishing rulings granting the Excess Profit exemption from other transfer pricing rulings authorising a downward transfer pricing adjustment"). The commission impliedly approves ordinary correlative or compensating adjustments as contemplated in article 9 of the OECD model treaty. *Id*. at paras. 174-181.

[87] *Id*. at para. 41.

[88] *Id*. at para. 14.

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regarded as part of the baseline,[89] the commission rejected that argument and concluded that the:

> objective of the Belgian corporate income tax system is to tax all corporate taxpayers on their actual profits, whether they are a stand-alone or group company, whether they form part of a domestic or multinational group, whether they form part of a large or small multinational group, and whether they have recently established operations in Belgium or whether they have operated in Belgium for many years. In other words, all those taxpayers are in a comparable legal and factual situation.[90]

Having identified taxing "actual profits" as the objective of the Belgian tax regime, the commission also concluded that recorded profits are actual profits.[91] A member state may adjust recorded profits for tax purposes, but permissible adjustments must be "of a general nature and . . . not selective."[92]

The commission's analysis in *Belgian Excess Profits* final closely resembled that in *Starbucks* final and *Fiat* final.[93] It concluded that Belgium violated the independent state aid arm's-length principle.[94] To prove its case, the commission repeatedly cited the OECD transfer pricing guidelines. The commission's main conclusion was that Belgium applied the TNMM incorrectly, an unobjectionable conclusion in light of Belgium's nonstandard three-step income calculation process.[95] And because the commission had already concluded that the exclusion of excess profits was not part of the reference base, the rulings represented a deviating advantage.[96]

The commission submitted several reasons why the deviation discriminated. For example, even though all groups had profits attributable to synergies and economies of scale, only multinational groups could exclude them, while domestic groups had to include them.[97] The commission also noted that only large multinationals received exemption rulings. Belgium responded that the regime was open to all, but the commission countered that the costs involved in obtaining an excess profits ruling dissuaded smaller companies.[98]

The commission also concluded that Belgium granted excess profits rulings only for companies that increased their activities in Belgium. Thus, according to the commission, Belgium treated some multinationals better than others — it subsidized only companies expanding in Belgium.[99]

On appeal, Belgium complains that the commission invaded Belgian competence by "using the state aid rules to unilaterally define the tax jurisdiction of the Belgian State."[100] It also

[89] *Id*. at para. 123.

[90] *Id*. at para. 126.

[91] *Id*.

[92] *Id*. The commission also noted that taxable profit is the "difference between income and costs determined in a competitive market." *Id*. at para. 127.

[93] Belgium's response to the commission's argument that the baseline was the tax of stand-alone companies was to argue that excluding the residual got multinationals closer to (not further from) the tax of stand-alone companies, because stand-alone companies do not earn excess profits. *Id*. at para. 17.

[94] *Id*. at paras. 134 and 145 ("The Commission considers the Excess Profit exemption to constitute a misapplication of and thus a deviation from the arm's length principle, which forms a part of that [reference] system.").

[95] The commission observed that the OECD guidelines do not provide for the serial application of the TNMM with the same entity regarded as (1) the untested party in the first application (and therefore allocated the excess profit) and (2) the tested party in the second application (and therefore allocated only a routine profit). *Excess Profit* final, *supra* note 1, at paras. 161-162. Nor do the guidelines provide a method for identifying and excluding the excess profit by subtracting the results of the serial application of TNMM. *Id*. at paras. 159 and 164. The commission also faulted Belgium for not requiring taxpayers to substantiate that the excess profit identified through serial application of TNMM was the result of synergies, economies of scale, and the like. *Id*. at para. 168.

[96] *Id*. at paras. 123-124, 131.

[97] *Id*. at para. 138.

[98] *Id*. at para. 140 ("Belgium was unable to provide a single example where the Excess Profit exemption was requested by and granted to a Belgian group entity that is part of a small multinational group.").

[99] *Id*. at para. 139. Belgium disputed this point, arguing that the excess profit regime was open to all multinationals. *Id*. at para. 88.

[100] Case T-131-16, Action for Annulment (Mar. 22, 2016), *Belgium v. Commission*, 2016 O.J. (C191) 36.

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argues that the commission failed to prove advantage, selectivity, or the use of state resources.[101] At least 29 of the companies affected by the investigation have filed actions for annulment of the commission's decision.

D. *Apple* Final

An earlier installment of this series of reports provided in-depth analysis of *Apple* final.[102] Here, I review the basics. The case involves a dispute about the amount of profit attributed to the Irish permanent establishments of two Irish-incorporated subsidiaries of Apple Inc., the U.S. ultimate parent. The subsidiaries were tax resident nowhere because of a mismatch between Irish and U.S. tax residence rules, which has since been resolved.[103] Using various strategies, Apple had shifted a large portion of its global income to the nowhere-resident subsidiaries, and it paid almost no current tax to any country on those profits.

The commission concluded that nearly all the income of the subsidiaries should have been allocated to the Irish PE of each nowhere-resident subsidiary and that Ireland's approval of rulings allowing Apple to allocate less income to the Irish branches therefore constituted state aid.

The commission followed the three-step reference base approach in *Apple* final.[104] The reference base was disputed. Ireland insisted that the reference base was Irish branch-profit allocation rules[105] that required inclusion of the "chargeable profits" attributable to the activities performed by the Irish branches.[106] But the commission responded that although those allocation rules formed *a part* of the reference base that included the rest of the Irish corporate tax rules, the branch allocation rules did not constitute a "separate reference system onto itself."[107] Further, the commission noted (and Ireland acknowledged) that domestic law did "not provide guidance on how to determine the chargeable profit of an Irish branch."[108] Specifically, it did not adopt arm's length.

As in the prior cases, the commission asserted that the reference base was "the ordinary rules of taxation of corporate profit under the Irish corporate tax system, which have as their intrinsic objective the taxation of profit of all companies subject to tax in Ireland."[109] The commission specifically rejected the notion that the reference base consisted solely of Irish rules for taxing branches of nonresident companies.[110] Although the commission acknowledged that the profits of integrated and non-integrated companies had to be determined differently because the profits of integrated companies "cannot be observed in a reliable way from the statutory accounts" and instead require "the use of estimates," what mattered to the commission was that the "ultimate goal" of the Irish tax system was to tax "integrated companies . . . on an equal footing to non-integrated companies."[111]

As in the previous income allocation cases, the commission applied its own allocation rules — the state aid arm's-length standard — to determine what Ireland should have taxed.[112] In the commission's view, "transactions within an integrated company should be conducted as if they were carried out between nonintegrated companies on the market."[113] As in *Starbucks* final and *Fiat* final, the commission asserted that this independent arm's-length standard originated in the state aid rules, not from the member state's

[101] *Id*.

[102] Mason, "Part 3," *supra* note 4.

[103] At the time the facts of the case arose, Irish law provided that only companies managed and controlled in Ireland were tax resident there. The United States has a place of incorporation rule for tax residence. The mismatch between the two states' rules meant that companies incorporated in Ireland but managed and controlled in the United States were tax resident nowhere. Ireland has since amended its rule to provide that companies incorporated in Ireland but not tax resident elsewhere under another country's rules will be tax resident in Ireland, even if not managed and controlled in Ireland.

[104] *Apple* final, *supra* note 1, at para. 224.

[105] *Id*. at para. 152 (citing section 25 of the Irish Taxes Consolidation Act of 1997 (TCA 1997)).

[106] *Apple* final, *supra* note 1, at para. 73 (citing domestic law as defining "chargeable profits" as "any trading income arising directly or indirectly through or from the branch or agency, and any income from property or rights used by, or held by or for, the branch or agency, [not including] distributions received from [resident] companies."). *Id*.

[107] *Id*. at para. 242.

[108] *Id*. at para. 248.

[109] *Id*. at para. 228 (citing Joined Cases C-78/08 to C-80/08, *Paint Graphos and Others*, EU:C:2011:550, para. 50).

[110] *Id*. at para. 245 (referring to Irish law section 25 TCA 97).

[111] *Id*. at para. 230.

[112] *Id*. at paras. 249-257.

[113] *Id*. at para. 254.

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adoption of the arm's-length principle in domestic law.[114]

Again as in the prior cases, after asserting its prerogative to apply an independent arm's-length standard as a matter of state aid law, the commission went on to use OECD guidance to flesh out the independent standard.[115] But the commission was careful to note that it applied OECD guidance not because Ireland incorporated it into domestic law or tax treaties but rather to elucidate the independent arm's-length principle that applied as a matter of state aid law. The commission stated:

> The OECD framework is non-binding, [and] the European Commission considers that framework to provide useful guidance to tax administrations and multinational enterprises on how to ensure that transfer pricing and profit allocation arrangements produce outcomes in line with market conditions.[116]

According to the commission, member state deviation from OECD guidance in a ruling therefore "provides an additional indication that [the member state's] method does not result in a reliable approximation of a market-based outcome in line with the arm's length principle," whereas a ruling consistent with the OECD framework "is unlikely to confer a selective advantage upon its recipient."[117] Pointedly, the commission emphasized again that the state aid arm's-length allocation standard applies "independently of whether the member state in question has incorporated the arm's length principle in its national legal system."[118]

Using modern OECD guidance, the commission then established that Ireland's rulings for Apple did not meet the arm's-length standard because, among other reasons, (1) Ireland accepted Apple's "unsubstantiated assumption" that intellectual property licenses held by the subsidiaries were properly attributed to their head offices rather than their Irish branches,[119] and (2) Ireland accepted Apple's application of the TNMM, which was erroneous because it identified the wrong complex party, the wrong profit indicator, and too low a profit margin.[120] The commission emphasized other defects with the rulings, including the lack of a contemporaneous profit allocation report, the rulings' long durations, and their lack of modification in light of substantial changes.[121]

The commission's bottom line on Apple was that as between the Irish PEs and the nowhere-resident head offices, the Irish PEs had substance, while the head offices "existed only on paper."[122] As a result, Ireland should have insisted that the profit of the subsidiaries be allocated to the Irish branches, not the head offices.[123]

The simplest way to understand Ireland's response was that the vast booked income of the nowhere subsidiaries substantively wasn't Irish, so that not only was Ireland not obliged to tax it, but there was no authority in Irish law for Ireland to tax it.[124] Ireland's sole obligation, in its view, was to determine the profits of the Irish branches, for which purpose it could limit its analysis to the activities of Irish branches themselves. Ireland believed it was not obligated to allocate the income of the nowhere-resident subsidiaries to the more substantive of the two parts of the enterprise — the head offices versus the branches.[125]

The commission concluded that Ireland's failure to allocate income to the Irish branches according to the state aid arm's-length standard represented a selective advantage when "compared to non-integrated companies whose taxable profit reflects prices determined on the

[114] *Id.* at para. 255.

[115] *Id.* at paras. 244-368.

[116] *Id.* at para. 255.

[117] *Id.*

[118] *Id.* at para. 257.

[119] *Id.* at paras. 321-322.

[120] For more detail, see generally Mason, "Part 3," *supra* note 4.

[121] *Apple* final, *supra* note 1, at paras. 333-375.

[122] *Id.* at para. 281.

[123] *See, e.g.*, *id.* at paras. 276-307.

[124] *See generally* Mason, "Part 3," *supra* note 4.

[125] *Id.*

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market negotiated at arm's length."[126] For good measure, the commission also concluded that the Apple rulings derogated from Ireland's own income allocation rule, either because the de facto Irish rule was the arm's-length standard (despite Ireland's assertions to the contrary)[127] or because Ireland had no consistent set of profit allocation rules and instead just granted discretionary or negotiated rulings, which itself constitutes state aid.[128]

On appeal, Ireland argues that even if what the commission refers to as the arm's-length principle were "legally relevant (which Ireland does not accept) the European Commission has failed to apply it consistently or to examine the overall situation of the Apple group."[129] Ireland also complains about the commission's retrospective application of modern OECD guidance, arguing that the commission "infringed the principles of legal certainty and legitimate expectations by invoking alleged rules of EU law never previously identified [and] OECD documents from 2010, but (even if they were binding) these could not have been foreseen in 1991 or 2007."[130] Ireland granted the contested rulings in 1991 and 2007.[131] Ireland also argues that the commission failed to prove essential elements of its state aid cases, including advantage and selectivity.[132] Apple made the same claims in its appeal.[133]

E. Pending

Several other cases await final commission decision, including *GDF Suez*.[134] Additionally, although it has not released a public version of its final decision, the commission has already announced that Luxembourg will be required to recover about $180 million from Amazon.[135]

III. Advantages of *Sui Generis* ALS

Rather than viewing the arm's-length income allocation standard as constituting part of the reference base because the accused member states incorporated it into their domestic law, the commission concluded in these cases that arm's-length allocation was an independent requirement mandated by state aid law.[136] Moreover, rather than recognizing that each country applies its own brand of arm's-length, each taking what it finds helpful from the OECD and supplementing with its own domestic rules, the commission conceived its own arm's-length allocation rules for use in state aid allocation cases. While the commission used OECD guidance to flesh out its own conception of arm's length, it also claimed that it was not bound by OECD guidance.[137] In this way, the commission conceived a reference base that it could use in every case, regardless of domestic law. The development of this *sui generis* arm's-length allocation standard serves at least four goals for the commission.

First, it simplifies enforcement by providing a single standard that the commission can apply in every income allocation case, regardless of domestic law. It therefore avoids the considerable difficulty of identifying the reference base.

[126] *Apple* final, *supra* note 1, at para. 321.

[127] *Id*. at paras. 369-378.

[128] At least when it results in tax savings compared with the state aid arm's-length standard. *Id.* at paras. 379-403.

[129] Case T-778/16, Action for Annulment (Nov. 9, 2016), *Ireland v. Commission*, 2017 O.J. (C 38) 35.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Case T-892/16, Action for Annulment (Dec. 19, 2016), *Apple Sales Int'l & Apple Operations Europe v. Commission*, 2017 O.J. (C 53) 37.

[134] Commission Decision (Sept. 19, 2016) initiating the formal investigation in SA.44888 (possible state aid in favor of GDF Suez), 2017 O.J. (C 36) 13. Experience has shown that the commission's approach can change significantly between its opening and final decisions.

[135] The commission's press release about its Amazon decision suggests that its analysis in that case was similar to that in the cases described here. *See* European Commission release, "State Aid: European Commission Finds Luxembourg Gave Illegal Tax Benefits to Amazon Worth Around €250 Million," IP/17/3701 (Oct. 4, 2017). *See also* Commission Decision (Oct. 7, 2014), initiating the formal investigation in SA.38944 (alleged aid to Amazon through a tax ruling), 2015 O.J. (C44) 02.

[136] *Starbucks* final, *supra* note 1, at paras. 264-265; *Fiat* final, *supra* note 1, at para. 229; *Excess Profits* final, *supra* note 1, at para. 150; *Apple* final, *supra* note 1, at paras. 255-257.

[137] *See* 2016 notice, *supra* note 12, at para. 173.

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Second, it allows the commission to defeat arguments like Belgium's that as measured by its own state-specific reference base, the member state did not confer advantages. Belgium argued that the exclusion of excess profits did not constitute an advantage because those excess profits simply were not part of the Belgian tax base. The commission's response was that because the exclusion of excess profits violates the state aid arm's-length standard, it constitutes state aid. Belgium's policy preferences on the taxability of excess profits are simply irrelevant under the *sui generis* standard.[138]

Similarly, Ireland insisted that the arm's-length method was not part of its domestic reference base for allocating income to branches of nonresident companies, so Ireland argued that it could not be faulted for failing to apply that standard to Apple's Irish branches. The commission responded with three alternative arguments. Ireland (1) actually used arm's length, despite its protests to the contrary, and varied from it for Apple; (2) had no standard whatsoever — it just made one-off deals with taxpayers, which itself constitutes state aid; or (3) it doesn't matter what standard Ireland used because all states must use the *sui generis* arm's-length standard, and failure to do so is state aid. Only the third alternative uses the universal state aid arm's-length standard. The implication is that no matter how rigorous a state's allocation rules (and neither Belgium nor Ireland seemed to exhibit much rigor in these cases), if the rule is anything other than the state-aid-specific arm's-length standard, the state grants illegal aid to companies that benefit from the deviating standard.

In this way, the commission abandoned its traditional domestic-law-reference-base approach in favor of a universal reference base approach, at least for allocation cases.

Third, the universal arm's-length allocation rule also defeats arguments that any tax savings experienced by select taxpayers arose from variation among national tax bases for which no particular state can be held responsible. If all states must apply the same allocation rule (at least theoretically), no income should be lost to mismatches, at least within the EU.[139]

Fourth, locating the arm's-length allocation requirement in the state aid rules (rather than as part of the domestic law reference base) allows the commission to mold the arm's-length allocation standard to suit its needs in the selectivity analysis — picking and choosing among contemporaneous, modern, and potentially even obsolete guidance from the OECD.

For example, the commission used a mix of contemporaneous and modern OECD standards to show that the Dutch ruling for Starbucks approved transfer prices that were not at arm's length.[140] Likewise, in *Apple* the commission heavily relied on the 2010 OECD PE profits attribution report,[141] even though Ireland granted the latter of the two contested rulings in 2007.[142] Not only had Ireland not endorsed the 2010 report for attributing profits to Irish branches, but the home offices of the relevant Irish branches did not reside in a state with which Ireland had a tax treaty (because they resided nowhere).[143] Thus, Ireland complained that the commission used OECD guidance that was intended to clarify the

[138] An implication of the *sui generis* arm's-length standard is that Belgium could not exempt excess profits even if it had, contrary to reality, applied the exclusion evenhandedly to domestic and multinational groups.

[139] In an earlier case, the commission decided that a mismatch was not state aid. The case involved the Dutch *Groepsrentebox* regime, under which related-party debt was both deducted by the payer and included by the recipient at a lower-than-normal tax rate. The Netherlands's goal in enacting the regime was to reduce distortions by taxing intragroup debt more like equity. When a Dutch member of a corporate group received interest from a group member outside the Netherlands, however, the group experienced a tax benefit: The payer deducted at its resident state's regular corporate tax rate, whereas the Dutch recipient included at the lower intragroup rate in the Netherlands. Although the group might receive an overall tax advantage, the commission concluded that the advantage arose from a mismatch, not from state aid granted by the Netherlands. Commission decision (July 2009) on state aid on the *Groepsrentebox* scheme, O.J. L 288, 04.11.2009. In its action for annulment of the commission's Apple decision, Ireland argued that the failure to tax all of Apple's income was the result of a mismatch and that "the State aid rules by their nature cannot remedy mismatches between tax systems on a global level." Case T-778/16, Action for Annulment (Nov. 9, 2016), *Ireland v. Commission*, 2017 O.J. (C 38) 35. Similarly, while Belgium phrased its pleadings generally, on appeal in the excess profits case, Belgium likely will argue that nontaxation under its excess profits regime was not aid because it arose from a mismatch.

[140] *See generally Starbucks* final, *supra* note 1 (citing both the 1995 OECD transfer pricing guidelines, which the Netherlands had incorporated into domestic law, and the 2010 OECD transfer pricing guidelines, which post-dated the rulings at issue in the case).

[141] *See, e.g., Apple* final, *supra* note 1, at paras. 88-89, 272-273, 323.

[142] *See generally* Tom O'Shea, "An Analysis of Some Apple State Aid Arguments," *Tax Notes Int'l*, Mar. 27, 2017, p. 1155 (detailing retroactive application of OECD standards to the Irish rulings by the commission in *Apple*).

[143] *Apple* final, *supra* note 1, at para. 153.

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application of article 7 of the OECD model treaty to determine tax consequences in a situation not governed by article 7.[144]

Responding to Ireland's arguments, the commission noted that initial guidance and drafts were available at the time of the second ruling; that PE profits attribution is similar to profits attribution under article 7 of the OECD model (which Ireland had in its tax treaties at the time of the Apple ruling); and that "no other alternative detailed and comprehensive analyses on methods of attributing profits are available."[145] Ireland complained that the commission imposed "an external reference framework,"[146] particularly because even as late as 2016 — the year of the commission's final decision in *Apple* — Ireland had yet to endorse the OECD PE profits attribution report as its method for attributing profits to Irish PEs.[147]

The commission avoids irksome retroactivity problems by citing OECD guidance not because the state endorsed it or incorporated it into domestic law, but rather because OECD guidance sheds light on the independent state-aid-specific arm's-length allocation standard that applies in every case.[148] Thus, OECD guidance becomes a "non-binding" "focal point" that "is the result of expert discussions," with the added bonus (but not necessity) that many states actually adopt it into law.[149] For the same reasons, the the *sui generis* arm's-length standard enables the commission to apply OECD guidance in situations not covered by tax treaties, as it did in *Apple*.[150]

Although the commission recently stated that adherence to the OECD guidelines normally will shield member states from adverse state aid decisions, it left open the possibility that adherence may be insufficient to avoid a finding of state aid.[151]

IV. Basis of *Sui Generis* ALS

The commission's derivation of the state-aid-specific arm's-length allocation rule rests on three arguments.

The first argument, which is independent of the other two, involves the commission's conflation of two different kinds of arm's-length standards.

The second argument is that stand-alone domestic companies are the appropriate comparator for determining whether a state properly allocated income to a multinational group (or the branch of a nonresident company). The commission reasons that if taxation of stand-alone domestic companies constitutes the correct reference base for multinationals, a member state must use arm's length to calculate the income of multinationals, just as the state requires stand-alone companies to report their income as earned in actual arm's-length transactions.

Third, the commission claims that *Forum 187*, a CJEU decision from 2006, provides support for the independent arm's-length standard.

Finally, this part reviews other recent CJEU case law that bears on whether the Court will uphold the independent arm's-length standard.

The next section, Section V, argues that the EU courts should reject the first argument, but that the second will be harder for the member states to defeat. The fate of the third argument depends on what the CJEU really meant in *Forum 187*. While the commission's view is plausible, the analysis it cites from *Forum 187* is ambiguous.

[144] *Id*.

[145] *Id*. at para. 322.

[146] *Id*. at para. 178.

[147] *Id*. at para. 197.

[148] The commission explained that to the extent it refers to the OECD framework in its decision, it does so "because that framework provides value guidance on whether a method for determining the taxable profit of a branch produces a reliable approximation of a market-based outcome in line with the arm's length principle, since it is the result of expert discussions in the context of the OECD and it elaborates on techniques aimed to address common challenges in international taxation." *Id*. at para. 441.

[149] *Id*. at para. 79; *Starbucks* final, *supra* note 1, at para. 66; *Fiat* final, *supra* note 1, at para. 88.

[150] *See supra* Sections II.D and III.

[151] 2016 notice, *supra* note 12, at para. 173 ("If a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method and leading to a reliable approximation of a market based outcome, a tax ruling endorsing that arrangement is unlikely to give rise to State aid.").

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A. Two Ships Called Arm's Length

The first premise for the independent state aid arm's-length allocation standard involves a mix-up. The state aid rules require states to hold enterprises at arm's length, and this requirement applies in both tax and nontax cases.[152] The mix-up arises when the commission draws on this state-to-enterprise arm's-length requirement to support its *sui generis* income allocation arm's-length requirement. The commission thus seems to confuse two different arm's-length standards.[153] I refer to arm's-length income allocation rules as pocket-to-pocket arm's length to emphasize that the concept does not involve the relationship between the state and the enterprise.

The well-supported state-to-enterprise arm's-length standard, which goes under various names in state aid doctrine, including the market economy operator test, requires member states to hold enterprises at arm's length.[154] But despite the commission's arguments about *Forum 187*, which I discuss later,[155] no clear precedent supports the notion that independently of member state domestic law, the state aid rules require parts of an enterprise to hold each other at arm's length.[156] Nor have the state aid rules — until now — been interpreted to mean that member states must, as a matter of state aid law, impose pocket-to-pocket arm's-length rules on their enterprises.[157]

B. Stand-Alone Company Reference Base

The commission's second argument for a state-aid-specific arm's-length income allocation standard derives from its choice of a stand-alone company reference base.

In each of the cases discussed here, the commission concluded that the appropriate reference base was the tax rules for stand-alone companies engaged only in domestic economic activity.[158] Because stand-alone companies engage in transactions only with third parties, by definition their income and expenses reflect market prices. Thus, states do not violate the state-to-enterprise arm's-length principle when they calculate the taxable income of stand-alone companies using actual market prices.

The commission acknowledged that prices and income allocation between parts of a group are not actually subject to market discipline and instead are subject to manipulation by the taxpayer. Thus, the commission acknowledged that states cannot simply accept multinationals' reported profits. But because the commission concluded that income calculation for stand-alone companies represented the reference base, and because income calculation for stand-alone companies depends on actual market transactions, the commission concluded that to avoid state aid, member states had to calculate multinationals' income in a manner that comes as close as possible to market transactions.[159]

In the commission's view, the best method to approximate a "market-based outcome" for multinationals was arm's-length transfer pricing.[160] Thus, the commission translated

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[152] *Id*. at paras. 73-114.

[153] Mason, "Part 4," *supra* note 4.

[154] *See, e.g.*, 2016 notice, *supra* note 12, at, paras. 73-114 (explaining the market economy operator test and how to apply it in various contexts).

[155] *See infra* Section IV.C.

[156] Although the CJEU endorsed the arm's-length income allocation standard in *Forum 187*, in that case the member state had itself adopted the standard in domestic law. Joined Cases C-182/03 and C-217/03, *Forum 187 ASBL*, EU:C:2006:416.

[157] Indeed, in the fundamental freedoms context, the CJEU repeatedly has disclaimed that the TFEU provides guidance about how member states should allocate income from cross-border transactions. *See* Mason, "Part 3," *supra* note 4, at 748.

[158] *See, e.g*, *Starbucks* final, *supra* note 1, at para. 244. *Cf. Fiat* final, *supra* note 1, at para. 215 (concluding that the reference system is the general Luxembourg corporate income tax system "irrespective of whether corporate income tax is imposed on the profit of group or stand-alone companies"). In *Apple*, the commission concluded that nonresident companies with domestic branches (so-called integrated companies) were properly compared with stand-alone domestic companies (so-called non-integrated companies). *See Apple* final, *supra* note 1, at para. 253.

[159] *See, e.g.*, *id.* at para. 253 ("A non-integrated company's taxable profit is determined by prices dictated by the market. . . . Consequently, to ensure that a profit allocation method endorsed by a tax ruling does not selectively advantage a non-resident company operating through a branch in Ireland, that method must ensure that that branch's taxable profit . . . is determined in a manner that reliably approximates a market-based outcome in line with the arm's length principle.").

[160] *Starbucks* final, *supra* note 1, at paras. 263-267; *Fiat* final, *supra* note 1, at paras. 227-231; *Excess Profits* final, *supra* note 1, at paras. 149-156; *Apple* final, *supra* note 1, at paras. 253-261.

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income determined under actual market conditions for stand-alone companies into a requirement for income allocated *only* at arm's length for multinationals. Moreover, any interpretation or application of the arm's-length principle that did not approximate a market outcome would be illegal aid to the extent that it reduced tax liability.[161]

The commission rests its reference base argument on an identity of purpose in states' assessment of corporate taxes for stand-alone domestic companies and multinationals — namely, the commission understands the purpose of the corporate tax in both contexts to be to tax the "profit of all companies subject to tax in" the relevant member state.[162]

C. 'Free Competition' in *Forum 187* (2006)

The final source for the commission's independent arm's-length standard is *Forum 187*, a 2006 state aid case decided by the CJEU.[163] In *Forum 187*, the Court affirmed the commission's finding that Belgium granted state aid through tax rulings issued under the Belgian coordination center regime. Under that regime, Belgium granted select companies (coordination centers) rulings that deviated from the OECD transfer pricing guidelines.[164] The rulings for the coordination centers deviated from the guidelines in myriad ways. For example, Belgium allowed coordination centers to exclude specific costs when they calculated income according to the cost-plus method.[165] Belgium also often allowed coordination centers to use a fixed markup of 8 percent to calculate their income under cost-plus.[166] OECD guidance authorized neither the exclusion of the costs nor the fixed markup.[167]

The CJEU agreed in *Forum 187* that the commission properly compared Belgium's transfer pricing regime for coordination centers with "the ordinary tax system, based on the difference between [the income and expenses] of an undertaking carrying on its activities in conditions of free competition."[168]

That language can be taken as modest support for the commission's approach in the current cases that compares income allocations for multinationals with income calculations for stand-alone domestic companies.[169]

In the recent cases, however, the commission construes "conditions of free competition" to mean only one thing: Income allocations must be judged by an independent arm's-length standard that applies regardless of whether the member state adopted any arm's-length standard into domestic law.[170] Thus, the commission asserts that the CJEU in *Forum 187* interpreted the state aid

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[161] Under this view, it is hard to see how the base erosion and profit-shifting project's patent box approach, with its formulary elements and optional "uplift" that allows states to increase tax benefits on the basis of an arbitrary percentage of expenses, could possibly pass muster under the state aid rules, despite the Code of Conduct Group's apparent approval of it. *See generally* Lilian V. Faulhaber, "The Luxembourg Effect: Patent Boxes and the Limits of International Cooperation," 101 *Minn. L. Rev.* 1641-1702 (2017).

[162] *See, e.g., Apple* final, *supra* note 1, at para. 228; *see also Starbucks* final, *supra* note 1, at paras. 244-249 (arguing that the purpose of Dutch transfer pricing rules was to "align the tax treatment of related companies with the treatment of unrelated companies").

[163] Joined Cases C-182/03 and C-217/03, *Forum 187 ASBL*, EU:C:2006:416.

[164] *Forum 187*, para. 6 ("A centre must first receive individual authorisation by royal decree. In order to obtain that authorisation, the centre must form part of a multinational group with capital and reserves of at least BEF 1,000 million and an annual consolidated turnover of at least BEF 10,000 million. Only certain preparatory, auxiliary and centralisation activities are authorised, and undertakings in the financial sector are excluded from the regime. At the end of the first two years of their activity, centres must have in Belgium at least the equivalent of 10 full-time employees.").

[165] *Forum 187*, para. 9 ("A centre's taxable income is determined at a standard rate according to the cost-plus method. It represents a percentage of the total operating expenses and costs, from which staff costs, financial charges and corporation tax are excluded.").

[166] *Forum 187*, para. 100.

[167] Commission Decision 2003/757 (Feb. 17, 2003) on the aid scheme implemented by Belgium for coordination centres established in Belgium, 2003 O.J. (L 282) 25, at para. 89 (*Forum 187* final).

[168] *Id.* at para. 95. The bracketed language fixes a mistranslation into English from the authoritative French. *See* Haslehner, *supra* note 22, at 150-151.

[169] Even this support is not unambiguous, because it is unclear whether the court approved of comparing income allocation for coordination centers with income allocation for stand-alone companies because (1) those groups are always comparable for state aid purposes or because (2) Belgium itself incorporated the arm's-length standard into its domestic rules for coordination centers when it adopted the OECD cost-plus method for those companies and, according to the OECD, cost-plus was meant to achieve income results similar to those for stand-alone companies (*i.e.*, arm's length).

[170] *Starbucks* final, *supra* note 1, at paras. 258-264; *Fiat* final, *supra* note 1, at paras. 223-228; *Excess Profits* final, *supra* note 1, at paras. 145-151; *Apple* final, *supra* note 1, at paras. 249-257.

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rules to mandate that states allocate income through this independent arm's-length standard.[171] That view departs from the traditional method of identifying tax state aid, which relies on deviations from a domestic law reference base.[172]

The language the commission relies on in *Forum 187* consists of only a few paragraphs[173] *in a case in which no party disputed that the correct reference base was the OECD guidelines.*[174] I argue that those paragraphs are ambiguous because the Court's use of "conditions of free competition" is susceptible to multiple interpretations.

1. As domestic law arm's length.

First, the CJEU could have used the phrase "the ordinary tax system, based on the difference between [the income and expenses] of an undertaking carrying on its activities in conditions of free competition" to describe Belgium's domestic law reference base.

According to Advocate General Philippe Léger in his *Forum 187* opinion, "conditions of free competition" was a description of the goals underlying OECD methods, including cost-plus, that had been developed to allocate taxable income.[175] In Léger's view, that goal, and OECD guidance in general, were relevant to the case, because Belgium derived the cost-plus method it applied as part of the coordination center regime from the OECD.[176] Belgium had thus made it part of the domestic law regime under scrutiny.[177] The CJEU took the same view.[178]

It is therefore ambiguous whether Léger's and the Court's approving references to income calculations under "the ordinary tax system, based on the difference between [the income and expenses] of an undertaking carrying on its activities in conditions of free competition" represents a description of the goals of cost-plus, as adopted into Belgian domestic law, or the standard to be applied in every state aid case regardless of domestic law.

The commission ignores this ambiguity and takes *Forum 187* to "endorse the arm's length principle as *the* benchmark for establishing whether a group company receives an advantage."[179] A more modest interpretation is that arm's length is merely a benchmark that was

[171] *Starbucks* final, *supra* note 1, at paras. 258-264; *Fiat* final, *supra* note 1, at paras. 223-228; *Excess Profits* final, *supra* note 1, at paras. 145-151; *Apple* final, *supra* note 1, at paras. 249-257. *See also Apple* final, *supra* note 1, at paras. 154-155 (noting Ireland's objections that it did not use the OECD arm's-length standard to attribute profits to a PE and that that standard was not adopted by the OECD until 2010, after the challenged rulings were issued).

[172] A discrimination approach would compare the member state's actual treatment of the favored class of taxpayers (here, coordination centers) with the member state's actual treatment of the disfavored set of taxpayers (here, companies that did not qualify as coordination centers). It would therefore use a domestic law, not a normative, base for comparison.

[173] *Forum 187*, paras. 94-96.

[174] Joined Cases C-182/03 and C-217/03, *Forum 187 ASBL* (opinion of Léger) EU:C:2006:89, para. 257 (noting that "Forum 187 does not appear to challenge the fact that whether or not an advantage exists falls to be assessed on the basis of the criterion which underlies the OECD's 'costplus' method").

[175] *Forum 187* (opinion of Léger), para. 246 (noting that the aim of the OECD methods, including cost-plus, "is that the prices charged should correspond to those which would apply in normal conditions of competition").

[176] *Forum 187* (opinion of Léger), para. 245 (noting that the Belgian coordination center regime was "based on the so called 'cost-plus' method, which is one of the systems recommended by the" OECD).

[177] *See, e.g.*, *Forum 187* (opinion of Léger), para. 247 (noting that the commission concluded that because Belgium allowed coordination centers to exclude costs from the cost-plus method, Belgium coordination centers' taxable income "is not calculated in such a way that services provided by the coordination centres are to be taxed as if they were supplied by another company, in a context of free competition, pursuant to the principle underlying the OECD's 'costplus' method").

[178] The CJEU described the cost-plus method of the Belgian coordination center regime as deriving from OECD guidance. *Forum 187*, para. 94 ("That method of assessment of taxable income is based on the so-called cost-plus method recommended by the [OECD] for the taxation of services provided by a subsidiary or a fixed establishment on behalf of companies belonging to the same international group and established in other States."). Immediately thereafter, the Court approvingly cited the commission's comparison of results under the coordination center regime with income calculated as the "difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition." *Id.* at para. 95. But it is unclear whether the Court meant that arm's length is inherent in the state aid rules, or that arm's length applied in *Forum 187* because Belgium adopted it in domestic law when it adopted cost-plus.

[179] *Fiat* final, *supra* note 1, at para. 225 (emphasis added). *See also Starbucks* final, *supra* note 1, at para. 261; and *Apple* final, *supra* note 1, at para. 251.

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relevant in *Forum 187* because Belgium adopted it as part of its coordination center regime.[180] It is ambiguous in *Forum 187* whether the arm's-length standard served as the benchmark because Belgium incorporated the OECD arm's-length standard into its domestic law or, as the commission now insists, because there exists an exogenous, normative arm's-length standard that applies as an independent state aid standard in every case, even if the member state never adopted it into domestic law.[181]

Another way of putting this question would be to ask: Did Belgium lose *Forum 187* because it deviated from its own income allocation rules (which required OECD cost-plus)[182] or instead because it deviated from a normative conception of what those allocation rules ought to be? Only the second scenario would support the *sui generis* arm's-length standard.

2. As an absence of state aid.

Another interpretation of the "free competition" language in *Forum 187* is plausible. Instead of referring exclusively to a state-aid-specific arm's-length allocation requirement that applies in every case, "conditions of free competition" could also refer to any method of income allocation that does not involve state aid. Under this view, free competition is just competition not tilted by the member state in favor of a select enterprise (or enterprises).[183] On this interpretation, "free competition" would simply be an antonym for state aid. One presumes that a state could arrive at a result consistent with free competition (in this sense) through more routes than just the arm's-length standard. Formulary apportionment or other methods of allocation may also generate results consistent with free competition, as long as those methods do not involve the state privileging some enterprises over similar others.

These other possible interpretations call into question the commission's interpretation of *Forum 187* to impose a uniform arm's-length income allocation mandate on the member states, regardless of whether those states incorporated arm's-length concepts into domestic law.

[180] All of the commission, Léger, and the CJEU understood Belgium to have adopted OECD arm's-length principles for application to coordination centers. *See supra* notes 173-177. At the time of *Forum 187*, Belgium also would have applied the arm's-length standard in the treaty context. *Forum 187*, *supra* note 163, at para. 43 (citing No 26/48 of the *Commentaar van het Wetboek van de Inkomstenbelastingen* 1992 (commentary on the income tax code) for the proposition that "when determining transfer prices, the Belgian administration must base itself on the OECD reports").

Although it is not clear that any of the commission, Léger, or the CJEU was aware of the fact, Belgium did not expressly adopt the arm's-length method outside the tax treaty and coordination center contexts until 2004, after the facts of *Forum 187* arose. In 2004 Belgium adopted arm's length for multinationals in all situations. *See Excess Profits* final, *supra* note 1, at para. 29. Although Belgian statutes did not expressly refer to "arm's-length" outside the tax treaty and coordination center contexts before 2004, Belgian domestic law incorporated arm's-length principles. *See*, *e.g.*, Case C-311/08, SGI, EU:C:2010:26 (analyzing long-standing Belgian domestic law (art. 26 CIR 92) that allowed the state to reallocate income in cases of gratuitous or unusual cross-border payments made to commonly controlled parties). A transfer was unusual if "contrary to the normal course of events and established business rules and practice, in the light of the prevailing economic circumstances and the financial situation of the parties." *Id.* at para. 4. A transfer was gratuitous when "granted in the absence of any obligation or consideration." *Id. See also* administrative circular (June 28, 1999), Circulaire n AAF/98-0003 dd.28.06.1999 (French version), Fisconetplus, at II.3. A. (Dec. 1, 2017) (interpreting a Belgian statute, art. 26 CIR 92, to require application of the arm's-length method for domestic income allocation, and repeatedly referring to the 1995 OECD transfer pricing guidelines). *See also* Jacques Malherbe and Ruben De Boeck, "The Belgian Experience," in *Multilingual Texts and Interpretation of Tax Treaties in EC Tax Law* 31 n.90 (2005) ("In Belgium, the term 'at arm's length transaction' is not used. Instead Arts. 26, 79, and 207 speak of 'abnormal and fortuitous advantages.'").

[181] Analogous support for the first interpretation can be found in Belgium's objection to the commission's findings on distortion of competition (rather than selectivity). Belgium complained that "the Commission's position that the scheme in question should be examined solely in the context of the ordinary tax legislation currently applicable in Belgium is unacceptable." *Forum 187*, *supra* note 163, at para. 51 (arguing that the right comparator was the treatment of coordination centers by other member states).

[182] *See* Raymond Luja, "State Aid Benchmarking and Tax Rulings: Can We Keep It Simple?" in *State Aid Law and Business Taxation* 117-119 (2016).

[183] Léger understood the goal of cost-plus (and other OECD methods) to determine income "in such a way that services provided by the coordination centres are to be taxed as if they were supplied by another company, in a context of free competition." Joined Cases C-182/03 and C-217/03, *Forum 187* (opinion of Léger), EU:C:2006:89, para. 274. Thus, Léger refers to "free competition" as deriving from OECD guidance rather than from the state aid principles. But for it to serve as a reference base for state aid purposes, in Léger's view, the OECD free competition standard evidently had to itself comply with the state aid rules. We know this because Léger noted that if were shown that OECD-compliant cost-plus (rather than the noncompliant variant that Belgium actually used for coordination centers) would result in an "unduly high" tax base for coordination centers, it "would show that the 'costplus' method is not appropriate for establishing the transfer prices of the coordination centres." *Id.* at para. 260. Thus, even though all the OECD methods purport to produce arm's-length results, Léger seemed to allow that as applied, some methods might violate the state aid rules.

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D. Other CJEU Precedent

In addition to *Forum 187*, a pair of recent cases strikes me as relevant for predicting whether the CJEU will ratify the commission's imposition of an independent arm's-length income allocation standard on the member states.

1. *Gibraltar* (2011).

Decided in 2011, *Gibraltar* is the most far-reaching tax state aid case.[184] The CJEU considered whether the commission erred by holding that the entire proposed Gibraltan corporate tax system would constitute state aid if enacted.[185] Under the proposed regime, which by its terms would have applied to "all companies,"[186] Gibraltar would levy a registration fee, a property tax, and a payroll tax. The commission reasoned that the property and payroll taxes constituted selective advantages because they would effectively exempt offshore companies, which typically had no payroll or property in Gibraltar.

The lower EU court, the General Court, vacated the commission's decision.[187] The General Court held that because the payroll and property taxes constituted part of the reference base, the exemption of offshore companies did not constitute a deviation and therefore could not be aid.

The commission argued that the reference base was irrelevant. It maintained that it was not required to identify a reference base in a case in which the entire tax regime discriminated,[188] a situation that could be discerned by looking at the anticipated effects of the regime, not just the language of the statute. Thus, the entire Gibraltar regime — rather than a deviating part of it — constituted the selective advantage.

The CJEU rejected the General Court's analysis and sided with the commission.[189] Although the CJEU claimed that the commission had in fact used a domestic law reference base,[190] it also declared that rigidly tying the commission to the reference base approach would allow regimes that "inherently discriminated" to avoid state aid enforcement.[191]

The Court emphasized that the purported "objective of the proposed tax reform [was to] introduce a general system of taxation for all companies established in Gibraltar."[192] But the proposed regime would not actually achieve that goal because it contained only property and payroll taxes, while lacking "a generally applicable basis of assessment providing for the taxation of all companies covered by that regime."[193]

Gibraltar is a bad precedent for any state defending itself from an adverse state aid decision, because it expands the commission's enforcement discretion by unmooring the state aid concept from the domestic law reference base. That's just what the commission seeks to do by applying a state-aid-specific arm's-length standard that is independent of domestic law. In *Gibraltar*, the CJEU ratified the commission's total departure from the domestic law reference base approach. In the current cases, the Court may likewise be willing to agree that when the commission uses a reference base, it can choose between a domestic law reference base and a normative reference base, presumably depending on which would better serve state aid goals.

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[184] Joined Cases C-106/09 P and C-107/09 P, *Gibraltar*, EU:C:2011:732 (involving the commission's evaluation of a proposed tax regime as state aid).

[185] The case involved a proposed regime, and the approval of the commission was sought for the regime before enactment, as required by state aid law. TFEU art. 108(3) ("The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.").

[186] Joined Cases C-106/09 P and C-107/09 P, *Gibraltar*, EU:C:2011:732 para. 12.

[187] *See id.* at para. 37. The United Kingdom appealed on behalf of Gibraltar, one of its overseas territories. Spain intervened on the side of the commission. Ireland intervened to support the United Kingdom and Gibraltar.

[188] *Id.* para. 49.

[189] *Id.* 90-91.

[190] *See id.* at para. 95 (noting that the commission had identified a valid baseline — the tax of onshore companies — against which the tax of offshore companies was selective).

[191] *Id.* para. 92 (limiting the commission to the reference base approach would mean that "national tax rules fall from the outset outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects in law and/or in fact").

[192] *Id.* at para. 101. The commission noted that "the stated aim of the reform is to adopt a new general corporate tax scheme that does not involve any element of State aid, to provide legal certainty for companies active in Gibraltar and to ensure sufficient revenue for the Gibraltar Government from company taxation," deliver compliance with the EU code of conduct, and eliminate "all discrimination between resident and non-resident, or domestic and non-domestic economic activity, i.e., the elimination of so-called ring-fencing provisions."

[193] *Id.* at para. 100.

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In one sense, *Gibraltar* represents a radical break with past state aid enforcement in the tax area because the commission invented (and the CJEU approved) a new method for identifying state aid. At the same time, however, Gibraltar engaged in exactly the kind of tax competition that the commission increasingly uses the state aid rules to combat.[194] Intervening in the case, Spain noted that Gibraltar's "real objective" was to attract foreign capital by investors seeking to avoid tax in their country of origin.[195] That claim can hardly be disputed. By clever tax base definition, Gibraltar essentially devised a ring-fenced exemption for offshore companies. And by using the state aid rules to strike the proposed regime, the commission did precisely what it set out in the 1998 notice to do (with the council's blessing) — namely, enforce the EU Code of Conduct's otherwise unenforceable resolution against harmful tax competition.[196]

So far, the CJEU has declined to extend *Gibraltar* because of its unique features, including that Gibraltar designed its entire regime to benefit a discreet "privileged category" of undertakings — namely, offshore companies.[197] Moreover, the current cases do not directly implicate *Gibraltar* because the commission claimed to follow the reference base approach in all of them. Perhaps for this reason, Treasury did not even discuss *Gibraltar* in its white paper on state aid.[198] But a lesson from *Gibraltar* is that the commission and the CJEU know state aid when they see it, and they are prepared to prohibit it under novel theories if precedents and published guidance are unable to supply established methods. This puts very broad enforcement powers into the hands of the commission and should make defenders of member state tax rulings uneasy, especially when those rulings suggest that the state deliberately aided taxpayers in avoiding other states' taxes. Time will reveal the full impact of *Gibraltar*.

2. *Aer Lingus* (2016).

The second recent case that bears on whether the commission can develop a normative income allocation rule is *Aer Lingus*, decided in 2016.[199] In that case, the CJEU rejected the idea that advantages for state aid purposes should be measured by a hypothetical, rather than an actual, reference base. Generalizing that approach would mean that if the commission uses the reference base approach, it must use the state's actual law as the reference base rather than an idealized state-aid-specific arm's-length standard.[200] *Aer Lingus* is a favorable precedent for the appealing Member States and taxpayers because in all the recent cases, the commission purports to use the reference base approach.

Aer Lingus involved Irish airline taxes. Ireland required airlines to collect an air travel tax on flights originating in Ireland. The tax was €2 for flights within 300 kilometers of Dublin, and otherwise it was €10. The commission launched a state aid investigation, but before the conclusion of that investigation, Ireland set the tax at €3 for all flights, regardless of destination.

The commission proceeded with its investigation for the period that Ireland had the two-tiered tax. A major question in the case was what baseline the commission should use in determining whether Ireland granted airlines a favorable deviation.

One possibility was that the reference rate should be €2, because Ireland collected at least that much on every trip and it was thus the most generally applicable tax. On a €2 reference rate, Ireland would have granted no state aid. (Rather, Ireland likely would have violated the prohibition on tax discrimination under the fundamental freedoms each time it collected the €10 tax. That would mean that Ireland would have to refund

[194] The proposed Gibraltan rules were internally consistent; if the Gibraltan regime were universalized, all income would be taxed exactly once. No company — no matter where it resided or where it held its factors of production — would be favored over any other, except to the extent that tax rates varied, but such variation is permissible under EU law.

[195] *Gibraltar*, at para. 56.

[196] For the history of state aid enforcement in the business tax area, see Mason, "Tax Rulings as State Aid FAQ," *supra* note 4.

[197] Joined Cases C 20/15 P and C 21/15 P, *World Duty Free Group*, EU:C:2016:981, paras. 73-74.

[198] Treasury, "The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings" (Aug. 24, 2016). Presumably, Treasury omitted *Gibraltar* because its goal was to persuade the commission that recovery would be inconsistent with the commission's own past practice, including its past practice of regarding "advantage" separately from "selectivity."

[199] Joined Cases C 164/15 P and C 165/15 P, *Aer Lingus*, EU:C:2016:990.

[200] If that is correct, the Court could limit the use of normative reference bases to cases like *Gibraltar*, in which the entire regime was purportedly "inherently discriminatory." *Gibraltar*, at para. 49.

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the difference, €8, to the airlines that paid the higher fee.)

Instead, the commission decided that the reference rate was €10, which meant that Ireland conferred state aid on the airlines every time it assessed tax at only €2, and Ireland had to recover the difference from the airlines. The commission concluded that the higher rate was the proper reference rate because the lower rate applied only in exceptional circumstances, namely, short-haul flights.

Setting aside the troublesome question of how to choose a reference base in a rate case,[201] *Aer Lingus* is a helpful precedent for member states arguing against the commission's imposition of an exogenous reference base. The airlines argued in *Aer Lingus* that the reference base should have been €3, the tax rate that Ireland presumably would have assessed across the board if it knew the two-tiered rate structure was illegal.[202] Under this conception, the difference between €3 and €2 would have been state aid for airlines that paid the €2, and Ireland would have had to recover it from the airlines. (Under the same conception, airlines that paid the €10 tax presumably would have experienced taxation that discriminated in violation of the fundamental freedoms, and if their claim was successful, Ireland would have had to refund to them the difference between €10 and €3.)

But the CJEU rejected the €3 reference base argument because that base relied on counterfactual reasoning.[203] Although it did not involve tax base definition or income allocation rules, *Aer Lingus* is a good case for taxpayers and states because it favors use of the state's actual rules as the reference base instead of hypothetical rules the state could have adopted. In his opinion in *Aer Lingus*, Advocate General Paolo Mengozzi argued that had the Court accepted the airlines' argument, it "would have the paradoxical effect of defining as 'normal' a rate of tax to which none of the undertakings concerned were subject during the reference period."[204] Using a normative allocation rule as the reference base instead of the state's own actual allocation rules would have the same effect: It would apply the state-aid-specific arm's-length rule only to taxpayers whose rulings were investigated by the commission, whereas the state's domestic law income allocation rule would apply to all other taxpayers.

3. Fundamental freedoms precedent.

More generally, the commission's claim that TFEU article 107 requires the member states to adopt a specific income allocation rule lacks adequate support, particularly in light of the CJEU's repeated assertions in fundamental freedoms cases that the TFEU provides no insight about how member states should allocate income among themselves, other than that the allocation rules they choose must comply with EU law.[205] It would be strange at this late date for the CJEU to find that the treaty allows states to use only arm's length.

V. Prospects on Appeal

To the extent that the commission's decisions rely on conflation of the state-to-enterprise arm's-length standard with pocket-to-pocket arm's-length, they should be overturned.

In addition to lacking support in the TFEU or judicial doctrine, the commission's assertion that the state aid rules require states to impose pocket-to-pocket arm's length, regardless of domestic law, leads to absurd results. For example, it would mean that a member state's unilateral adoption of the commission's own common consolidated corporate tax base (CCCTB) proposal, which would allocate multinationals' income among the states by formula apportionment, would convey

[201] *Aer Lingus*, at para. 42. Ryan Air argued that there was never a "normal" or "reference" rate under the Irish system, which always had two rates. *Id.* at para. 47.

[202] *Id.* at para. 54. Another argument was that the commission should have reduced the recovery to account for the fact that the €10 fee was a violation of the fundamental freedoms that would have to be refunded by Ireland to the airlines that collected it. *Id.* at paras. 61-65. Finally, the airlines argued that only the part of the tax that was not passed on to passengers should be recovered. The CJEU rejected all three of the airlines' arguments. It noted that incidence doesn't matter. *Id.* at para. 102. Also, it held that the national court had the responsibility to ensure that any subsequent compensation under the fundamental freedoms to the airlines for paying the higher tax "does not give rise to new aid . . . to the benefit of the undertakings receiving such reimbursement." *Id.* at para. 119.

[203] *Aer Lingus*, para. 52 ("fixing a reference rate other than that actually applied during the period in question would not allow all the effects of [the contested tax] to be fully apprehended") (citing opinion of Mengozzi).

[204] Joined Cases C 164/15 P and C 165/15 P, *Aer Lingus* (opinion of Mengozzi), EU:C:2016:515, para. 41.

[205] *See* Mason, "Part 4," *supra* note 4, at 957-961.

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illegal aid whenever the proposed formula resulted in less liability for a company than the company would have under the commission's pocket-to-pocket arm's-length standard.[206]

Likewise, for the reasons given above, the commission stands on shaky ground when it relies on *Forum 187* to support its *sui generis* arm's-length income allocation standard. But there are too few business tax state aid cases for me to predict whether the CJEU will accept or reject the commission's plausible, if not slam-dunk, interpretation of *Forum 187*.

In my view, the commission's strongest argument for using an arm's-length standard in state aid cases derives from the commission's selection of stand-alone companies as the reference base. The member states reject the stand-alone company reference base, arguing that differences in their legal entitlement to tax domestic and multinationals companies necessitate different allocation rules for each.[207] The member states therefore contend that the correct reference base in judging whether a particular ruling confers aid is whether that ruling comports with that country's treatment of other multinationals.[208] In other words, as long as the challenged member state adhered to its own transfer pricing rules (which in most cases was the contemporaneous OECD arm's-length standard), then, the states argue, the commission should find no aid.

The commission was not unsympathetic to the notion that member states must treat multinationals and stand-alone companies differently. It rightly acknowledged that avoiding double taxation and countering abusive income shifting could justify differences in income calculation between domestic and multinational taxpayers.[209] Thus, the commission acknowledged that the income calculation approach for stand-alone companies might have to be adjusted for multinationals, but it rejected the notion that stand-alone companies would form no part of the reference base.

The commission seems to me to have the better argument on this point. The problem with the member states' view that the proper reference base consists of the states' tax treatment of only other multinationals is that although it would prevent member states from preferring some multinationals over others, it would not preclude member states from systematically preferring multinationals over stand-alone domestic companies. The state aid rules were designed to prevent such favoritism.[210] Thus, it is unlikely that the CJEU would accept that member states can have one standard for multinationals but a different (and not equivalent) standard for stand-alone companies. The real question, then, is whether only the commission's *sui generis* arm's-length standard is capable of allocating income to multinationals in a way that does not favor them over stand-alone domestic companies.

In other words, even if the CJEU agrees with the commission that domestic stand-alone companies are the appropriate reference base in state aid cases involving allocation of income to multinationals, that does not mean that the CJEU must endorse the commission's *sui generis* arm's-length standard. Rather, the Court should be willing to accept any faithfully applied allocation rule that does not inherently prefer multinationals to stand-alone companies.

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[206] For more on this argument, see Mason, "Part 3," *supra* note 4. The CCCTB proposal would apply only to multinationals; the income of domestic standalone companies would continue to be calculated based on actual market transactions, an outcome that, if adopted unilaterally, would be illegal aid under the Commission's standalone-company reference-base approach, which requires multinationals' income to be calculated under *sui generis* arm's-length. For the latest CCCTB legislative proposal, see Proposal for a Council Directive on a Common Corporate Tax Base, COM (2016) 685 final (Oct. 25, 2016). EU-level adoption of CCCTB would presumably not constitute aid because any tax savings it conferred would be imputable to the EU (not to a particular member state) under the reasoning of *Deutsche Bahn*. *See* Case T-351/02, *Deutsche Bahn AG v. Commission*, EU:T:2006:104 (holding that an allegedly discriminatory German tax exemption could not be analyzed as state aid when it derived from an EU directive because the exemption was not imputable to Germany). This doctrine has been subject to criticism.

[207] *Excess Profits* final, *supra* note 1, at para. 80 (Belgian argument that since under domestic law it could tax only the arm's-length profit, Belgium was not allowed to tax excess profit); *Apple* final, *supra* note 1, at para. 195 (arguing that Ireland lacked authority to tax the non-Irish profits of Apple's nonresident affiliates).

[208] *See, e.g.*, Irish appeal in *Apple Sales International and Apple Operations Europe v. European Commission*, T-892/16. *See also Starbucks* final, *supra* note 1, at para. 245 (noting Dutch argument that proving selectivity would require evidence that Dutch Starbucks "has received a different treatment as compared to other group entities tax resident in the Netherlands" that were subject to Dutch domestic income allocation rules).

[209] *See supra* discussion Section II.

[210] *See* Mason, Part 5, *supra* note 4.

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Under this analysis, the member states could choose, among other legally permissible allocation rules, formulary or arm's length, even though formulary does not approximate a market-based outcome. If EU law permits member states to choose their allocation rules, the commission's enforcement efforts then would be limited to ensuring that (1) the member state's allocation rule does not itself violate the state aid rules, and (2) the member state consistently applies its chosen allocation rule to all taxpayers without cutting sweetheart deals.

Return to the commission's assertion that the state aid rules require member states to only and always use the *sui generis* arm's-length income allocation standard. Because the member states generally already incorporate OECD arm's-length concepts into domestic law, in most cases there will be little practical difference between the commission's asserted standard and the traditional domestic law reference base approach.

But what's really at stake in these cases is who — the commission or the state itself — gets to choose the income allocation rule. The member states say that they get to choose, and they can choose OECD arm's-length, formulary, or something else, as long as the standard they choose does not itself violate the state aid rules.[211]

The commission is not explicit, but its reasoning seems to be that by using separate accounting to tax the net income of stand-alone domestic companies, states automatically triggered application to multinationals of separate accounting with the commission's state-aid-specific arm's-length standard. Under that standard, the state's own income allocation rules — no matter how clear, transparent, and faithfully executed — are illegal unless they lead to a so-called market-based outcome. According to the commission, a market-based outcome can arise only from application of the state-aid-specific arm's-length income allocation standard, and the commission alone is competent to describe that standard.

Notice, however, that the commission's analysis presumably would run differently if the member states had different income calculation rules for domestic companies. If member states calculated stand-alone domestic companies' income under, for example, formulary apportionment, the commission presumably would not object to states using formulary for multinationals. Thus, use of a stand-alone-company reference base is not fundamentally at odds with the idea that member states are free under the state aid rules to choose their income allocation rules. Instead, use of a stand-alone company reference base leads to the conclusion that member states must, to the extent possible, use the same allocation rules — whatever they may be — for stand-alone and multinational companies.

VI. Superfluousness

The *sui generis* arm's-length standard used by the commission in the recent income allocation cases is not needed to uphold the result in any of them. In *Starbucks* final, *Fiat* final, and *Belgian Excess Profits* final, the commission purported to show that the states violated the *sui generis* arm's-length standard, but it also purported to show that the states violated their own domestic arm's-length standards (which in all three cases the commission concluded was the OECD arm's-length standard applicable at the time of the challenged ruling).[212]

If the states deviated from their own reference base in favor of particular undertakings, that would be enough under the traditional reference base standard to trigger the remaining step in selectivity analysis. Thus, in three of the cases, the EU courts can sustain the recovery orders on modest grounds without introducing an unpredictable new standard.

This brings us to *Apple* final. That case is tricky for the commission because Ireland apparently did not have clear standards or guidelines for attributing profits of a nonresident company to an Irish PE. In *Apple* final, the commission used the

[211] For my views on state aid limits on states' selection of allocation rules, see Mason, "Part 4," *supra* note 4, at 958-961.

[212] *See, e.g.*, *Starbucks* final, *supra* note 1, at paras. 409-412. For in-depth analysis of the *Starbucks* final case by a transfer pricing expert, see William Morgan, "Transfer Pricing Methods in the European Commission's Starbucks Case," *Tax Notes Int'l*, May 9, 2016, p. 573 (concluding in part that contrary to the commission's views, the arm's-length method does not require the use of comparable uncontrolled prices over TNMM).

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sui generis arm's-length standard to supply the missing reference base. Thus, while the other three cases could be resolved without resorting to the *sui generis* arm's-length standard, the commission may have applied that standard in those three cases as part of an overall strategy to develop a universal reference base that it could use in cases like *Apple* final, in which the conventional domestic-law-reference-base approach was problematic because the state lacked a clear domestic allocation rule.

But even *Apple* final could be resolved through a more conventional approach. The commission examined all of Ireland's PE rulings and found that in all of them, Ireland either accepted the taxpayer's application of the OECD standard or the tax administration exercised unbounded discretion in accepting allocation ruling requests. The latter would make Ireland's PE profits allocation ruling regime state aid under long-standing commission guidance, although it is unclear how the recovery would be calculated.[213]

The former would mean that even though Ireland never formalized it into domestic law, Ireland's own domestic standard was in fact the OECD arm's-length principle. If this is correct, and if the commission carried its burden to show that the Apple rulings deviated from OECD arm's length, then Ireland deviated from its observed (if not statutory) domestic law reference base. Under either of those theories, the CJEU could affirm the commission's decision that Ireland granted aid to Apple, while rejecting the commission's *sui generis* arm's-length standard.

One last note on establishing selectivity: The third step in the analysis — after establishing the reference base and the deviation from the reference base — is discrimination. The commission must show that the state granted the benefit to some taxpayers while denying it to comparable others.

There are several ways the commission could establish discrimination in these cases. One kind of potential discrimination is between multinationals that sought rulings and those that self-assessed under the arm's-length standard. Rooting out this kind of discrimination would seem to target what is most troubling about secret rulings: the possibility that the member state uses them to cut special deals with favorite taxpayers.

Other potential types of discrimination include stand-alone companies versus multinational, domestic versus nonresident, and so on. Right or wrong — reversible error or not — this part of the commission's analysis would be unaffected by the selection of a domestic law rather than a normative income allocation rule as the reference base. Thus, if the commission's assertions are correct that the states violated their own rules, the commission doesn't need the *sui generis* arm's-length standard to reach the conclusion that the states conferred illegal aid.

VII. Conclusion

There have been reports that companies are less likely to seek tax rulings since the commission's investigations.[214] By itself, a reduction in rulings tells us nothing, other than that taxpayers now face more legal uncertainty in Europe. Taxpayers may engage in equally aggressive tax plans in the absence of rulings, drawing comfort from vigorous member state opposition to the recent commission decisions. What used to be done with a ruling secured in a day's time before the investigations could still be done with self-reporting and a nudge and a wink. Winking self-reporting is just as nontransparent as rulings — even more so, because at least rulings can be exchanged with other countries or discovered by the commission.

The scope of EU state aid enforcement in the tax area is unpredictable. Lawyers in Europe worry that tax policies as quotidian as participation exemption and as central as territoriality may constitute state aid. That legal uncertainty arises partly because the commission uses the state aid rules to pursue several conflicting values, and it does not always specify clearly in each case what value it pursues. The goals of state aid control should be more clearly articulated, and the commission's enforcement

[213] Commission notice on application of the state aid rules to measures concerning direct business taxation, 1998 O.J. C-384/03, at paras. 21-22 (Dec. 10, 1998); 2016 notice, *supra* note 12, at paras. 123-125.

[214] *See* Stephanie Soong Johnston, "Dispute Resolution Becoming More Difficult, Practitioners Say," *Tax Notes Int'l*, Sept. 5, 2016, p. 854.

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actions should be limited by those goals. Those limitations could be self-imposed by the commission, using clearer published guidance and more explicit reasoning in decisions, or those limitations could come from the EU courts through less deferential judicial review of the commission's state aid decisions.

At least in part, the state aid prohibition seems to be the inverse of the nondiscrimination principle under the fundamental freedoms.[215] While the fundamental freedoms prohibit a state from discriminating *against* cross-border commerce over domestic commerce, the state aid rules prohibit a state from discriminating *in favor* of cross-border commerce over domestic commerce.[216] If true, this interpretation could help clarify how the state aid rules should be interpreted and help clarify when two taxpayers are comparable.[217] The commission's appropriate goal of eliminating sweetheart rulings would fit comfortably within that interpretation.[218]

Over the last four decades, as the CJEU has decided myriad tax cases, observers of EU tax doctrine have come to understand the bargain struck by the member states in the TFEU in a particular way. When the member states joined the EU, they gave up their entitlement to use their tax systems to discriminate, at least when that discrimination would undermine the common market in violation of the fundamental freedoms or prohibition on state aid. Thus, member states cannot use taxes to discriminate on the bases of sector, size, region, nationality, or engagement in cross-border commerce. At the same time that they ceded tax sovereignty, however, the states retained authority to define their tax bases (including their allocation rules) and set their tax rates, provided they did not discriminate on impermissible bases. By imposing a normative income allocation rule, the recent state aid cases call into question this accepted understanding of the impact of EU law on Member State tax powers. ■

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[215] *See* Case C518/13, *Eventech*, EU:C:2015:9, para. 53; Joined Cases C-106/09 P and C-107/09 P, *Gibraltar*, EU:C:2011:732, para. 101; Case C-15/14 P, *Commission v. MOL* (opinion of Wahl), EU:C:2015:32, para. 54; and Case C270/15 P, *Belgium v. Commission* (opinion of Bobek) EU:C:2016:289, para. 29. This statement is only a partial description. It applies to the aspect of state aid rules that prohibits export subsidies, but it does not apply to the aspect that prohibits, say, sectoral or regional aid. *See generally* Mason, "An American View," *supra* note 4.

[216] Joined Cases C 20/15 P and C 21/15 P, *World Duty Free Group* (opinion of Wathelet) EU:C:2016:624, para. 137 (citations deleted, emphasis added).

[217] Much has been written on how to identify discrimination against cross-border commerce. *See, e.g.*, Mason and Michael S. Knoll, "What Is Tax Discrimination?" 121 *Yale L.J.* 1014 (2012).

[218] At a tax conference, Max Lienemeyer, head of sector in the Task Force Tax Planning Practices of the European Commission's Competition Directorate General, suggested that the main concern about tax rulings was that states use them to prefer particular companies. He said, "We are just looking at where tax authorities have clearly gone beyond the normal application of the rules and given certain deals to some companies that they don't give to others." Santhie L. Goundar, "European Commission Defends State Aid Investigations," *Tax Notes Int'l*, June 27, 2017, p. 1238. Countering Lienemeyer's legitimate concerns about sweetheart rulings does not require exogenous standards.

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